

*United States Court of Appeals
for the Second Circuit*



APPENDIX

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74-1359

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United States Court of Appeals
For the Second Circuit.

PETER CAPARRO,
Plaintiff-Appellant,
against

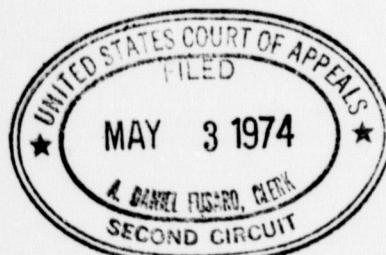
KONINKLIJKE NEDERLANDSCHE STOOMBOOT
MAATSCHAPPIJ, N. V.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

ZIMMERMAN & ZIMMERMAN,
Attorneys for Plaintiff-Appellant,
160 Broadway,
New York, N. Y. 10038
(212) BA 7-1350.

BURLINGHAM, UNDERWOOD & LORD,
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United States Court of Appeals
FOR THE SECOND CIRCUIT.

PETER CAPARRO,

Plaintiff-Appellant,

against

KONINKLIJKE NEDERLANDSCHE STOOMBOOT
MAATSCHAPPIJ, N. V.,

Defendant-Appellee.

Relevant Docket Entries.

Date	Proceedings
1972	
Sept. 20	Filed Complaint & Issued Summons.
Sept. 20	Filed Pltffs demand for a trial by jury.
Oct. 10	Filed defts Answer to the complaint.
1973	
Nov. 1	Filed pre-trial order. Frankel, J.
1974	
Jan. 14	Before Tyler, J. Jury trial begun (on issue of liability). Deft's motion for a directed verdict of acquittal on the issue of negligence on the part of the shipowner—granted. Deft. withdraws defense of contributory negligence on part of pltff.

Relevant Docket Entries

Jan. 14 Trial concluded. Jury verdict for pltff. on issue of unseaworthiness. Court grants deft's motion for a directed verdict of acquittal notwithstanding the verdict on unseaworthiness. Submit Judgment (Settle on notice)

Jan. 23 Filed Judgment—ordered that deft. have judgment against pltff. dismissing pltff's complaint. Tyler, J. Judgment entered—1-24-74 Clerk. entered on docket 1-28-74. (m/n)

Jan. 23 Filed Judgment—ordered that deft. have judgment against pltff. dismissing pltff's complaint and further conditionally ordered that in the event the USCA or the Supreme Court of the U.S. shall reverse said judgment in favor of deft., then there shall be a new trial of the issue of deft's liability to pltff. for claimed unseaworthiness. Tyler, J. Judgment entered—1-24-74. Clerk. Entered on docket 1-28-74. m/n

Feb. 13 Filed Pltff's Notice of Appeal from so much and such parts of the Orders of Tyler, J., and two Judgments both dated 1/21/74 and both filed 1/23/74 and both Judgments entered by Clerk on 1/24/74 as grant deft's motion for directed verdict dismissing pltff's claim of liability for negligence, etc. as indicated. (Mailed copy to Burlingham, Underwood & Lord on 1/20/74)

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PETER CAPPARO,

Plaintiff,

against

KONINKLIJKE NEDERLANDSCHE STOOMBOOT

MAATSCHAPPIJ N. V.,

Defendant.

Plaintiff, complaining of the defendant above-named, by Zimmerman & Zimmerman, his attorneys, respectfully alleges:

I. Upon information and belief, the defendant is a foreign corporation.

II. Upon information and belief, the defendant does not have its principal place of business in the State of New York.

III. Plaintiff is a citizen and resident of the State of New York.

IV. That the matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand (\$10,000.00) Dollars.

V. Upon information and belief, that at all the times herein mentioned, the defendant was the owner of the vessel, the M. V. Hercules.

VI. Upon information and belief, that at all the times herein mentioned and prior thereto, the defendant manned said vessel and its master, officers and crew were on board said vessel and in possession of same.

Complaint

VII. Upon information and belief, that at all the times herein mentioned and prior thereto, the defendant managed, operated, maintained and controlled said vessel.

VIII. Upon information and belief, that at all the times herein mentioned, said M. V. Hercules was docked at the 39th Street Pier, Brooklyn, New York, and stevedoring work was being performed thereon.

IX. Upon information and belief, that at all the times herein mentioned, the stevedoring work on said vessel was being performed by Northeast Stevedoring Company, Inc., pursuant to agreement with the defendant or its agents.

X. Upon information and belief, that at all the times herein mentioned, said stevedoring work was being performed on said vessel under the general supervision and direction of the defendant, its agents, employees, the master, officers and crew of said vessel.

XI. That at the time hereinafter mentioned, plaintiff was employed as a longshoreman by said Northeast Stevedoring Company, Inc. and, in the course of the performance of his duties, was lawfully on said vessel, in the lower hold of Hatch #2 thereof.

XII. Upon information and belief, that at all the times herein mentioned and prior thereto, the defendant, its agents, employees, the master, officers and crew of said vessel maintained the lower hold of Hatch #2 and the cargo being stowed therein.

XIII. Upon information and belief, that at all the times herein mentioned and prior thereto, said lower hold of Hatch #2 of said vessel was maintained, supplied and provided by the defendant to longshoremen for use in connection with the performance of their stevedoring work on said vessel.

Complaint

XIV. Upon information and belief, that at all the times herein mentioned and prior thereto, the lower hold of said vessel had chassis with dunnage on top there and, in addition thereto, large cartons with wire straps were being loaded in said area.

XV. Upon information and belief, that at all the times herein mentioned and prior thereto, said chassis with dunnage thereon and said cartons with wire straps were maintained by the defendant in said lower hold of Hatch #2 of said vessel.

XVI. Upon information and belief, that at all the times herein mentioned and prior thereto, the defendant, its agents, employees, the master, officers and crew of said vessel maintained said deck with chassis and dunnage thereon and said cartons with wire straps thereon, when both the straps and the frame of the chassis were defective, making said deck dangerous, hazardous and not suitable or safe for use by longshoremen and the defendant so maintained, supplied and provided same for use by said longshoremen.

XVII. That on or about the 17th day of September, 1971, while plaintiff was engaged in the performance of his work and was lawfully on said deck, when he was caused to trip and fall and to sustain severe personal injuries.

XVIII. That said accident was caused by reason of the unsafe and unseaworthy condition of said vessel and by reason of the carelessness and negligence on the part of the defendant, its agents, employees, the master, officers and crew of said vessel, and without any contributing fault or lack of care on the part of the plaintiff; in that they failed to supply plaintiff with a safe place to work; in that they failed to maintain, supply and provide suitable, safe and proper walking and working surfaces; in that they maintained the working and walking areas

Complaint

on said vessel in a hazardous condition with insecure chassis, dunnage and with cartons with wire straps thereon; in that they permitted and allowed said chassis and said cartons to be placed and remain on said deck, creating a dangerous and hazardous condition; in that they maintained said deck in a dangerous, hazardous and unsafe condition, not suitable or safe for use or for the purposes intended, and such unsuitability caused the very accident complained of; in that they unnecessarily exposed the plaintiff to harm and to the very accident complained of, which was foreseeable; in that they maintained said condition on said deck, which constituted a trap and a nuisance under the circumstances; in that they violated the Safety and Health Regulations for Long-shoring; in that they failed to remedy or repair said conditions complained of; in that they failed to warn the plaintiff thereof; in that they failed to take reasonable precautions to see that said deck was safe for use and the purposes intended to make same safe for use; in that they improperly directed and permitted the plaintiff to perform his work on said vessel under the circumstances which were dangerous and hazardous; in that they permitted said vessel to be, become and remain unsafe and unseaworthy and so maintained same; in that they failed to avoid said accident although they had reasonable opportunity to do so; and in that they were careless and negligent in other respects and said vessel was otherwise unsafe and unseaworthy.

XIX. That as a result thereof, the plaintiff sustained certain severe personal injuries, both internal and external, to divers parts of his arms, head, legs and body, and he was made sick, sore, lame and disabled and suffered a severe shock to his nervous system, and plaintiff believes that some of the injuries he sustained may remain permanent.

Complaint

XX. That plaintiff was compelled to expend divers sums of money for medical aid and attention in the endeavor to cure himself of the injuries he sustained and may in the future be compelled to expend further sums of money for such purpose, and plaintiff was and may in the future be unable to pursue his usual vocation, to his damage.

XXI. That by reason of the premises, plaintiff has sustained damage in the sum of One Hundred And Fifty Thousand (\$150,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of One Hundred And Fifty Thousand (\$150,000.00) Dollars, besides the costs and disbursements of this action.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
Borough of Manhattan
City of New York (38)

Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendant, by its attorneys Burlingham Underwood & Lord, answering plaintiff's complaint, states upon information and belief:

1. Admits the allegations of paragraphs I, II, and V.
2. Denies knowledge of information sufficient to form a belief as to the truth of the allegations of paragraphs III, IV, and XI.
3. Admits the allegations of paragraphs VI and VII, except insofar as the vessel, portions thereof, her appurtenances, gear, etc. where manned, possessed, managed, operated, maintained, or controlled by others, and except insofar as the master, officers, or crew were temporarily ashore.
4. Denies the allegations of paragraphs VIII and IX, except admits that on September 17, 1971 M/S Hercules was being stevedored at 39th Street Terminal, Brooklyn by Northeast Stevedoring Co., Inc.
5. Denies the allegations of paragraphs X, and XII through XXI, inclusive.
6. The injuries and damages complained of, if any, were caused or contributed to by plaintiff's negligence or by the negligence, fault, breach of contract, or breach of warranty of and by persons for whose conduct defendant is not liable.

Pre-Trial Order

WHEREFORE, defendant demands judgment dismissing the complaint with its costs and disbursements.

BURLINGHAM UNDERWOOD & LORD
Attorneys for Defendant
By s/ William M. Kimball
A Member of the Firm
25 Broadway
New York, New York 10004
HAnover 2-7585

Pre-Trial Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

On the 31st day of October, 1973, the parties to this action or their attorneys appeared before the Court at a pre-trial conference pursuant to local calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken:

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 6 of this pre-trial order.
2. The parties agreed that the trial of this action shall be based upon this order and upon the pleadings as amended, except that the following issues raised by the pleadings are expressly abandoned: None.
3. (a) The parties stipulated that the following facts are not in dispute in this action (each party reserving

Pre-Trial Order

the right to object to the materiality of any such stipulated facts and its relevancy to the issues:

1. The jurisdiction of this Court in this matter is conceded.
2. That on September 17, 1971 the defendant owned the M. V. Hercules, which vessel was docked at the 39th Street Pier, Brooklyn, New York, and stevedoring work was being performed thereon.
3. That said defendant employed the officers and crew of said vessel, some of whom were on board the vessel on that day.
4. That the stevedoring work was being performed on said vessel on that day by Northeast Stevedoring Company, pursuant to agreement with the defendant or its agents.
5. That on said date, plaintiff was a longshoreman, employed by Northeast Stevedoring Company.
3. (b) It is the plaintiff's contention that on September 17, 1971, he was employed as a longshoreman by Northeast Stevedoring Company on board the M.V. Hercules and while performing his work in Hatch #2 when he sustained severe personal injuries due to the unsafe and unseaworthy condition of said vessel and by reason of the carelessness and negligence on the part of the defendant, its agents, employees, the master, officers and crew of said vessel, and without any contributing fault or lack of care on the part of the plaintiff; in that they failed to supply plaintiff with a safe place to work; in that they failed to maintain, supply and provide suitable, safe and proper walking and working surfaces; in that they maintained the working and walking areas on said vessel in a hazardous condition with insecure chassis, dunnage and with cartons with wire straps thereon; in that they permitted and allowed

Pre-Trial Order

said chassis and said cartons to be placed and remain on said deck, creating a dangerous and hazardous condition; in that they maintained said deck in a dangerous, hazardous and unsafe condition, not suitable or safe for use or for the purposes intended, and such unsuitability caused the very accident complained of; in that they unnecessarily exposed the plaintiff to harm and to the very accident complained of, which was foreseeable; in that they maintained said condition on said deck, which constituted a trap and a nuisance under the circumstances; in that they violated the Safety and Health Regulations for Longshoring; in that they failed to remedy or repair said conditions complained of; in that they failed to warn the plaintiff thereof; in that they failed to take reasonable precautions to see that said deck was safe for use and the purposes intended and to make same safe for use; in that they improperly directed and permitted the plaintiff to perform his work on said vessel under the circumstances which were dangerous and hazardous; in that they permitted said vessel to be, become and remain unsafe and unseaworthy and so maintained same; in that they failed to avoid said accident although they had reasonable opportunity to do so; and in that they were careless and negligent in other respects and said vessel was otherwise unsafe and unseaworthy.

It is plaintiff's contention that as a result of the accident he sustained the following personal injuries and sequelae:

1. Fracture olecranon spur right elbow
2. Contusions of low back
3. Abrasions of low back
4. Sprain of low back
5. Abrasion of both elbows
6. Contusions both elbows

Pre-Trial Order

7. Pain and tenderness over posterior aspect right elbow
8. Pain and tenderness on lateral aspect and extensor tendons of right elbow
9. Pain on pronation and supination.
10. Defect in range of motion of flexion, extension, pronation and supination of right elbow.
11. Marked intra bursal fluid and periosteal tenderness.
12. Capsulitis of right elbow
13. Shock.

Upon information and belief, some or all of these injuries and sequelae are permanent in nature and plaintiff has a permanent partial disability of the right elbow equivalent to the loss of function of 20% of the right arm.

Plaintiff claims loss of earnings of approximately \$3,100. and medical expenses of approximately \$. Damages for pain and suffering and permanency are undetermined.

3. (c) Defendant denies liability for plaintiff's claimed accident and claims that plaintiff was contributorily negligent in failing to make reasonable use of his own faculties to avoid any injury.
4. (a) Plaintiff intends to produce some or all of the following witnesses:

1. Fellow members of the gang
2. Medical expert
3. Maritime expert
4. Others named by defendant.

Plaintiff intends to use some or all of the following exhibits:

1. Medical reports

Pre-Trial Order

2. Department of Labor records
3. Income reports
4. Employer reports
5. Deck and cargo plans
6. Others named by defendant.

4. (b) Defendant may call some or all of the following witnesses:

In addition to all witnesses listed by plaintiff and any needed to contradict or impeach any witness or exhibit or lay foundation for the introduction of any evidence, any ship's officer or unlicensed crewmember, stevedore's safety director, superintendent foreman, timekeeper, hatch boss, gang members and investigator, the doctors who treated or examined plaintiff, any nautical, stevedoring, medical, and rehabilitation experts as may be required.

Defendant may offer the following exhibits:

In addition to all exhibits listed by plaintiff, heretofore or hereafter marked for identification or existence of which is already known to plaintiff or anyone representing him, and any needed to contradict or impeach any witness or any other exhibit, the pertinent accident, claims, suits, compensation, medical, employment, wage, and pension records, the pertinent ship's deck log and translation, accommodation and cargo plans, and any stevedore's records pertaining to the claimed accident and work being done, medical records, and any needed to contradict or impeach any witness or exhibit or lay foundation for the introduction of any evidence.

5. The parties also agreed on the following matters:

Plaintiff at this time expects to require 2 trial days; the defendant at this time expects to require 1 trial day.

Pre-Trial Order

6. The issues to be tried are formulated by the Court (with the consent and agreement of the parties) as follows:

- (1) Was the defendant negligent as contended in No. 3 (b) herein?
- (2) Was the M.V. Hercules unseaworthy as contended by the plaintiff in No. 3 (b) herein?
- (3) If the defendant was negligent as claimed or if the said vessel was unseaworthy as claimed, did plaintiff sustain any injuries as a proximate result of such negligence or unseaworthiness?
- (4) What is the pecuniary value of the plaintiff's damages?
- (5) Was the plaintiff guilty of contributory negligence in bringing about his injury as contended in No. 3 (c) herein?
- (6) If plaintiff was guilty of any negligence which proximately contributed to the happening, what portion of the responsibility for the accident is attributable to plaintiff's negligence?

Dated: New York, New York
November 1, 1973.

So Ordered

s/ FRANKEL
U. S. D. J.

Zimmerman & Zimmerman
Attorneys for Plaintiff

Burlingham Underwood & Lord
Attorneys for Defendant

15a
TRANSCRIPT.

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----x

4 PETER CAPPARO,

5 Plaintiff,

6 vs.

72 Civil 4012
(HRT)

7 KONINKLIJKE NEDERLANDSCHE STOOMBOOT
8 MAATSCHAPPIJ N.V.,

9 Defendant.

10 -----x

11 Before: HON. HAROLD R. TYLER, D.J.,
12 and a Jury.

13 New York, January 14, 1974;
14 10.00 A.M.

15 APPEARANCES:

16 ZIMMERMAN & ZIMMERMAN, ESQS.,
17 Attorneys for Plaintiff;
18 160 Broadway,
19 New York, N.Y.;
20 BY: Martin M. Baxter, Esq., of Counsel.

21 BURLINGHAM, UNDERWOOD & LORD, ESQS.,
22 Attorneys for Defendant;
23 25 Broadway,
24 New York, N.Y.
25 BY: William M. Kimball, Esq., of Counsel.

26 - - -

27 (A jury was duly impaneled and sworn.)

28 - -

29

2 MR. BAXTER: If it please the Court, Mr.
3 Kimball, and ladies and gentlemen of the jury:

4 As his Honor has told you, both Mr. Kimball
5 and I now have an opportunity to address you as to what
6 the case is about. Our version of what the case is
7 about is not evidence. What we intend to prove and
8 what we say, of course, is not evidence. What Mr.
9 Kimball says is not evidence. The evidence you hear
10 will come from the witness box or from any stipulations
11 we agree to on the record, or any exhibits admitted into
12 evidence.

13 This is what we call a split trial. You are
14 not going to hear anything about injuries. You are not
15 going to hear anything about his damages to the extent
16 there is pain and suffering or anything of that nature.
17 It is strictly on what his Honor will describe later to
18 you and define, liability.

19 There will be certain questions you will be
20 asked to find as facts and, basically, it is whether
21 or not the shipowner was negligent, or whether or not
22 his vessel was unseaworthy as regards my plaintiff,
23 to show whether that was what we call "the proximate
24 cause" of my plaintiff's accident. His Honor will
25 define to you these various words I am using because

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2 they are legal words of art. In his charge he will tell
3 you what they mean. You have to be guided by what he
4 says on the law.

5 You, of course, will judge the facts. That's
6 what you are going to hear from my plaintiff and from his
7 witness. They are going to be two men who will testify.
8 We expect it will be finished before lunch today, the
9 testimony part of it.

10 This case, as his Honor has already told you,
11 is about an accident that occurred to a longshoreman.
12 The accident, the testimony will show, happened in September
13 of 1971. It was at the 39th Street pier aboard the M/V
14 Hercules, which is a vessel owned by the defendant steam-
15 ship company. The plaintiff was working for the Northeast
16 Stevedoring Company, Inc. That was his employer. They
17 were loading this vessel.

18 I am not going to go into the facts of the
19 accident because you are going to be hearing it yourself
20 in a few moments. It would be repetitious.

21 There are a couple of words, possibly, I would
22 like to describe.

23 One of them is that the plaintiff was working
24 in the lower hold. Now a hold on a ship is merely a space
25 to store cargo. Usually, and on this ship, it goes from

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2 one side of the ship to the other, which we call the skin
3 of the ship, and the hold has watertight compartments
4 separated one, two, three, four (indicating) from the aft
5 end, the back end of the ship. The compartment could be
6 anywheres from 40 x 60 or 30 x 60. Actually, the dimensions
7 of this hold will not be a pivotal part of this case.

8 The testimony will show that they were stowing
9 cargo in the No. 2 lower hold and they used a hi-lo.

10 A hi-lo is a machine that has two forks in the front and
11 lifts cargo up and down. You may have seen them in the
12 newsreels or on TV. The man sits -- the man who drives
13 it--on the engine part of it. In the front there are two
14 pieces of steel, which, by hydraulic pressure, raise or
15 lower the forklift. This way they come in and pick up
16 something, raise it up, stow it, and then back out and
17 maneuver around. That is what we mean by a hi-lo. It
18 goes high and it goes low. The forklift part of it will
19 be the front part that has two forks that will go under
20 pallets which are just pieces of wood that have especially
21 designed spaces for the forks to go in and lift it up.

22 It can lift it up 10 or 12 feet and they can stow. They
23 use it on the docks. This time they were using it
24 aboard the vessel to help stow the cargo up high.

25 You will hear an expression, "The square of the

2 hatch." The hatch itself, as I described it to you,
3 is a big empty part of the ship when it has no cargo in it.
4 Naturally, when you put cargo in it, it fills up with
5 cargo. To get the cargo in you have an open space
6 above you. The best description is that there is a stair-
7 well. Imagine a stairwell in a six-floor house. If you
8 were physically to remove those stairs you would have an
9 empty space, and if there was no roof going from the first
10 floor of the cellar up to the sky, that's what we mean by
11 the hatch opening aboard a ship.

12 Naturally, the cargo has to come from a pier
13 or from a lighter, come down this open space down to the
14 bottom hold, and then you start stowing it. You load it
15 and put it in certain parts of the vessel. The square of
16 that hatch is what you will be hearing, and that is that
17 part where, if you stand and look straight up, you will
18 see the sky. The square of the hatch can be on the lower
19 hold where this took place or it can be on the deck above
20 where they put in beams or hatch boards or pontoons, and
21 people can walk on that, and it is like putting a trapdoor
22 down, if you want to use that expression, but it is many,
23 many hatch boards to make up that floor.

24 We are not concerned with what we call the 'tween
25 deck. We are talking about the lower hold today and that

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2 is the bottom of the vessel.

3 The hi-lo, the testimony will show, was operating
4 in that square.5 There is one other word you will hear and that
6 is coaming. By that they mean the part of the cargo space
7 that is underneath the overhead, which means deck.8 In other words, if I am standing in the square and I look
9 straight up I can see the sky. If I take cargo and
10 place it under here or under here (indicating), which
11 is away from the sky, in direct line with the sky, that
12 would be under the coaming. It really means under the
13 deck, in the sense we are using it.14 Those are about the only words I think might
15 be strange to you: coaming, square of the hatch, and
16 hi-lo, plus forks, which is that part of the hi-lo that
17 goes into cargo, or under it, and raises it up or lowers
18 it.19 During the course of this loading operation,
20 the plaintiff sustained an injury as a result, we say,
21 of the negligence and unseaworthiness of the vessel.
22 You will hear from him in a moment and he will tell you
23 his version of what happened.24 Please keep an open mind on all the testimony
25 until his Honor gives you the case for your decision.

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2 It is not fair to me and it is not fair to Mr. Kimball as
3 soon as you hear one side of the question to come to a
4 conclusion.

5 You took your oath, and that was to obey the
6 instructions of the Court. The Court doesn't want you
7 to come to a conclusion until the case is given to you.
8 Please pay strict attention and we will look for a verdict
9 for the plaintiff at the end of the case.

10 MR. KIMBALL: If your Honor pleases, Mr. Baxter,
11 and Ladies and Gentlemen of the Jury:

12 I don't disagree with anything that Mr. Baxter
13 has told you so far. While my client has no personal
14 knowledge, and I certainly have no personal knowledge,
15 of the circumstances of this claimed accident, it is my
16 understanding that it happened on the date aboard the ship
17 and at the place which Mr. Baxter mentioned to you.

18 I do want to introduce myself. As you may have
19 heard, my name is Kimball.

20 The defendant in this case is a Dutch steamship
21 company of which I am, and have been, general counsel in
22 this part of the world for quite a number of years.

23 It is difficult to pronounce it the Dutch way, but the Court
24 has accurately translated it into English as the Royal
25 Netherlands Steamship Company.

gp

My company, as is common and customary, hires a stevedoring company to provide longshoremen to load and discharge the ship. In this particular case we were at the 39th Street terminal in Brooklyn and the stevedoring company at that terminal is the Northeast Stevedoring Company, Inc., so, as Mr. Baxter said, the plaintiff in this case was employed as a longshoreman not by my company but by the Northeast Stevedoring Company, Inc.

The Northeast Stevedoring Company, Inc., of course, furnish a number of longshoremen, and they furnish supervisory personnel to, as they say, boss these longshoremen. One of the supervising personnel was a hatch boss. These longshoremen work in gangs of, give or take, 20 men under the supervision of a hatch boss, who is also a Northeast employee.

I believe you will learn in this particular case the hatch boss was a man by the name of Salica, Sonny Salica. Mr. Salica was actually driving the hi-lo at the time of this accident.

The hi-lo also is something which is furnished by the Northeast Stevedoring Company, Inc. In other words, they provide whatever movable gear and equipment they believe is needed in order to do the job for which they have been hired.

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2 In this particular instance, for some reason --
3 I have no doubt it was a good reason, and we have no
4 quarrel with the use of hi-los -- if they think it is
5 necessary to use hi-los they have hi-los and they use them.
6 Of course, you can get some idea of the size of the space
7 we are talking about when you visualize that it was large
8 enough to put all kinds of cargo in there and still have
9 machine moving around inside of the space.

10 There are a couple of more words you may hear.
11 While they will hopefully be defined by the witnesses,
12 I think, as Mr. Baxter obviously does, it is sometimes
13 helpful for you to be somewhat familiar with these words
14 before you hear them.

15 You may hear something about dunnage. Dunnage,
16 at least for purposes of this case, is nothing more or less
17 than pieces of wood, not wood of the sort you would use to
18 make a jurybox, but rough pieces of wood which are used to
19 separate things. In this instance they were used to
20 separate cargo.

21 Then you will hear about some straps. Straps are
22 nothing more than very thin, extremely thin, pieces of
23 metal, bands. You have all seen them. They are used to
24 bind up various types of cargo or packages.

25 The longshoremen have a way of describing types

2 of cargo, and to them it means when they use these words
3 they have definite mental picture of what they are talking
4 about. They talk about a case, and a case to them means
5 something which is cargo enclosed in a wooden box.

6 Then they talk about bundles, bundles wrapped
7 in corrugated, as they say. What they mean by that is
8 a relatively large piece of cargo which is in a cardboard
9 box.

10 They sometimes talk about a chassis. That's
11 not necessarily meaning a particular part of an automobile
12 or a truck. It often can mean just a rather large and
13 sometimes ungainly or irregularly shaped piece of machinery.

14 I believe we may hear something in this case,
15 perhaps, about dunnage, about straps, about cases, about
16 so-called bundles, and about a chassis.

17 Thank you very much, your Honor.

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2 P E T E R C A P P A R O, called as a witness in his
3 own behalf, being first duly sworn, testified
4 as follows:

5 DIRECT EXAMINATION

6 BY MR. BAXTER:

7 Q What is your occupation?

8 A I am a longshoreman, a hold man.

9 Q How long have you been a longshoreman?

10 A 16, 17 years.

11 Q Were you a longshoreman on September 17, 1971?

12 A Yes, I was.

13 Q For whom were you working on that date?

14 A Well, I was hired by Northeast Terminal and
15 working on the Vessel Hercules.

16 Q You were hired by Northeast Stevedores?

17 A Yes.

18 Q What was your job that day?

19 A That day I was hired as a hold man.

20 Q What are the duties of a hold man?

21 A Well, our duties are to take orders from the
22 hatch boss and to stow the cargo away.

23 Q Who was your hatch boss on that day?

24 A Salica.

25 Q Is that Rosario Salica?

1 GP Capparo-direct 12

2 A I think so.

3 Q Is he nicknamed Sonny?

4 A Skinny.

5 Q And what time did you go aboard the Hercules on

6 September 17, 1971?

7 A We call like our group a gang.

8 Q What time did you go aboard?

9 A A little after eight.

10 Q Where was the Hercules tied up on that day?

11 A On the side of the pier.

12 Q What pier?

13 A 39th Street pier.

14 Q Where is that located?

15 A On 39th Street and, I think, First Avenue.

16 Q In what borough?

17 A Brooklyn.

18 Q Was this your regular gang, Salica's gang?

19 A No.

20 Q What was your regular gang? Who was your hatch

21 boss?

22 A Angelo DiCristina.

23 Q Why were you working in Salica's gang on September

24 17, 1971?

25 A My gang was ordered in as break-up.

1 gp Capparo-direct 13

2 Q What do you mean by that?

3 A They break us up and fill in the other gangs
4 where they are short men.

5 Q You are an extra man?

6 A Yes.

7 Q That day?

8 A That day, yes.

9 Q When you came aboard the Hercules after 8 o'clock
10 on September 17, 1971, where did you go? What hatch?

11 A No. 2.

12 Q What part of No. 2?

13 A Lower hold.

14 Q Is the lower hold the bottom deck of the vessel?

15 A The bottom of the ship.

16 Q When you went down to the No. 2 lower hold, what
17 were you doing? Was it a discharging or loading operation?

18 A Loading the ship.

19 Q When you got down there a little after 8, was it
20 empty or was there some cargo in there already?

21 A There was cargo in there already.

3 22 Q What type of cargo, to the best of your recol-
23 lection, was there?

24 A All general cargo; all different type of cargo.

25 Q Did you continue or did you commence and then

1 gp Capparo-direct
2 continue to load general cargo during the morning?
3 A Yes.
4 Q Nothing happened to you during the morning?
5 A No.
6 Q Something happened to you in the afternoon?
7 A Yes.
8 Q At about what time did something happen to you?
9 A Close to quitting time.
10 Q What is quitting time?
11 A 5 o'clock.
12 Q It was before 5 o'clock?
13 A Yes.
14 Q Can you give us an approximation of how much
15 before 5 o'clock?
16 A 15 minutes, something like that.
17 Q Just before your accident, say five minutes
18 before your accident, what was the gang doing in the No. 2
19 lower hold?
20 A We were loading the ship.
21 Q Were you still loading general cargo?
22 A Yes.
23 Q Can you describe the type of general cargo you
24 had been loading during the morning and in the afternoon,
25 and specifically, more especially, say five or ten minutes

1 gp Capparo-direct 15

2 before your accident?

3 A It was all type of cargo.

4 Q Like what?

5 A Cases and cartons.

6 Q You say "cartons." Do you mean cartons made out
7 of cardboard?

8 A Cardboard with straps around them.

9 Q Are the cartons made of cardboard?

10 A Yes. Some. Some we handle like that.

11 Q Some of them have straps around them?

12 A Yes.

13 Q These are metal straps?

14 A Yes.

15 Q Thin?

16 A Yes.

17 Q How wide?

18 A Half-inch, like that.

19 Q These you had been stowing?

20 A Yes.

21 Q How did you stow the cargo? By what means?

22 A By machine.

23 Q By what kind of machine?

24 A Hi-lo.

25 Q Was the general cargo stowed by the hi-lo?

1 gp Capparo-direct 16

2 A No. Some time we get small cargo that we can
3 handle and we put it away ourselves.

4 Q I am talking, specifically, on the day of your
5 accident. In the course of the morning and afternoon, did
6 there come a time when you and other men just physically
7 stowed the smaller cargo?

8 A We had to, yes.

9 Q At other times you used a hi-lo?

10 A When a piece was heavy.

11 Q At the time of your accident where were you?

12 A At the time of the accident I was standing on a
13 case.

14 Q Let's get what hold.

15 A No. 2 hold.

16 Q You are still in No. 2?

17 A Yes.

18 Q You are still in the lower hold?

19 A Yes.

20 Q What were your orders, if any, at the time of
21 your accident?

22 A Well, we had a piece coming down with wires,
23 lowered down to the hold with wires. They released the
24 wires, the men, and the machine picked it up.

25 Q When you say that the machine picked it up,

1

gp

Capparo-direct

17

2

are you referring to the hi-lo machine?

3

A Yes.

4

Q Is that the only machine down there?

5

A Yes.

6

Q Where was the machine operating in the No. 2 lower
7 hold?

8

A On the port side of the ship.

9

Q Specifically was it under the coaming or in the
10 square? Where was it?

11

A It was partly under the coaming and partly out.

12

Q What part was under the coaming and what part was
13 out?

14

A The forks were sticking out.

15

Q Did there come a time that the hi-lo picked up
16 the carton with its forks?

17

A Yes.

18

Q From that time on will you tell me and the Judge
19 and the jury exactly how your accident occurred and what
20 you did?

21

A Well, we received a piece from offshore to come
22 into the hatch. A couple of men released the wires and
23 the machine came in and picked it up. Then the hatch boss
24 told me to guide it in.

25

Q To guide it in where?

1 gp Capparo-direct 18

2 A Into the space where he is putting the case.

3 Q Where was this space?

4 A On the offshore side.

5 Q Whereabouts?

6 A On the top.

7 Q In the square or under the coaming?

8 A Under the coaming.

9 Q What did you do?

10 A I went up and stood on a case that was on the chassis and I was guiding them in.

12 Q Let's stop there for a moment.

13 Q What do you mean by "chassis"?

14 A An automobile chassis. Just the frame.

15 Q Was there one or more than one?

16 A A lot of them in the hatch.

17 Q What?

18 A Where I was standing there it was about three high and this narrow case on the top of it.

20 Q Three high on the chassis?

21 A The chassis.

22 Q And this narrow case you are talking about, did that rest directly on the chassis?

24 A It was resting on the chassis.

25 Q You stood on this case?

1 gp Capparo-direct

2 A Yes.

3 Q Describe the length of this case.

4 A It was pretty long.

5 Q Like what?

6 A As long as the chassis.

7 Q How long was the chassis?

8 A How long is the chassis of a car? About 17.

9 Q About the size of this table?

10 A Longer.

11 Q And the case was that length?

12 A Almost.

13 Q How wide was the case?

14 A About a foot and a half square round. You know.

15 Q I don't know. I was not there.

16 A It is about a foot and a half.

17 Q How high was it?

18 A About a foot and a half. It was a square like.

19 Q You were standing on this?

20 A Yes.

21 Q And guiding --

22 A Guiding the machine to put the case away.

23 Q How were you guiding this machine?

24 A Well, I was talking to him and telling him where

25 to go, where to put the case.

1 gp Capparo-direct 20

2 Q Talking to him? To whom?

3 A To the machine driver.

4 Q Who was the machine driver?

5 A Salica.

6 Q That was the hatch boss?

7 A Yes.

8 Q Take it from there. You were talking to him
9 and giving him signals?

10 A Signals to go in.

11 Q Did you get this carton into the space?

12 A Yes.

13 Q What happened after it got in?

14 A After we put the case away the machine was backing
15 out --

16 MR. KIMBALL: Objection, your Honor.

17 I rise to say we run into difficulty if we start
18 to use different words. One speaks of a carton and this
19 has to do with a case.

20 Q Mr. Capparo, the item of cargo that was being
21 stowed by the forklift, by the hi-lo, what was that cargo?
22 What did it consist of?

23 A I don't know what was in it.

24 Q I don't mean the contents. Was it a wooden case
25 or a corrugated case?

1 gp

Capparo-direct

21

2 A Strapped with corrugated all around it.

3 Q That's what you call a carton?

4 A If you want to.

5 Q Was the case wooden?

6 A No. It was not wooden. It was strapped with
7 corrugated all around.

8 Q This corrugated strapped box, how big was it?

9 A Nice size. I don't exactly know the measure-
10 ments.

11 Q Was it more than a foot?

12 A Yes.

13 Q How big?

14 A About 4 foot high.

15 Q How wide?

16 A Possibly asquare of 4 feet.

17 Q 4 by 4 by 4, like a cube?

18 A Yes.

19 Q Do you know how much it weighed?

20 A No. It was heavy.

21 Q Was it heavier than 100 pounds?

22 A Way heavier.

23 Q Heavier than 250 pounds?

24 A Oh, yes.

25 Q When you guided Salica, who was operating the
hi-lo, you guided it in and you say then he withdrew the

1 gp Capparo-direct 22

2 forks. What did you do and what did you see?

3 A When he withdrew the forks I heard something
4 crackling and in a few seconds the piece gave way.

5 Q What piece?

6 A Underneath. The carton underneath gave way.

7 As it was coming down a strap broke and then I backed away.

8 Q You mean you walked backwards?

9 A I backed away not to get hit with the carton,
10 as you would call it. As I backed away it come down so
11 fast that it hit the case and knocked me over.

12 Q Where did you land?

13 A I landed with my back and my elbows on the steel
14 chassis, and then I rolled over onto the floor.

15 MR. BAXTER: We won't go into the injuries.

16 This is a split trial.

17 I have no further questions, your Honor.

18 CROSS EXAMINATION

19 BY MR. KIMBALL:

20 Q You say your hatch boss, Salica, was employed by
21 Northeast?

22 A Yes.

23 Q Was he using one of the Northeast machines?

24 A Yes, sir.

25 Q This piece which you were guiding, helping the

1 gp Capparo-direct 23

2 hatch boss to put in stow, was it a piece 4 x 4 x 4, weighing

3 more than 250 pounds?

4 A Yes.

5 Q What was the outer covering or packaging of the

6 piece made of? Of what material?

7 A Corrugated.

8 Q What do you mean by "corrugated"?

9 A Carton material. It is like carton material.

10 Q It is like a cardboard?

11 A Yes. It was strapped.

12 Q In order to keep the cardboard from coming off

13 it had what you call straps?

14 A Bands.

15 Q Or bands?

16 A Bands.

17 Q And those you tell us are about a half-inch wide

18 piece of metal about as thick as, say, a matchbook cover,

19 or something like that?

20 A Something like that.

21 Q Very thin.

22 A Something like that.

23 Q You were guiding Mr. Salica to stow this or put

24 it in a space up on top of some other cargo; is that right?

25 A That's right.

1 gp

Capparo-cross

24

2 Q While Mr. Salica was taking the forks out from
3 underneath that piece of cargo, was he backing away from
4 it?

5 A He was backing out.

6 Q Slow?

7 A Yes.

8 Q So while he was slowing backing away from the
9 cargo, did it fall off the place where it had been stowed?

10 A No. He backed out first. He got out.

11 Q You mean he got the forks all the way out before
12 the piece fell?

13 A Yes.

14 Q Do you recall having had your deposition taken?

15 A Yes.

16 Q On December 4, 1972?

17 MR. BAXTER: We will stipulate it was so taken.

18 Q And it was signed before the Notary Public at
19 Zimmerman's office on February 21, 1972?

20 MR. BAXTER: So stipulated, your Honor.

21 MR. KIMBALL: Thank you.

22 Q On page 42, do you recall being asked this
23 question and giving this answer?

24 "Q When the piece began to fall were the forks of
25 the hi-lo still up in the air?

1 gp

Capparo-cross

25

2 "A Yes. Almost out."

3 What did you mean by "Almost out"?

4 A I meant they were out. You know, at the end
5 of the case or carton, or whatever you want to call it.6 Q You mentioned that you heard some noise; is that
7 correct?

8 A Yes.

9 Q Did anything break that you know of during the
10 course of this operation?11 A I don't understand. While we were stowing the
12 piece?

13 Q While the hi-lo was withdrawing its forks.

14 A No. I didn't hear anything.

15 Q Do you recall having answered these questions
16 in this manner, on page 40, line 17?17 "Q Where were the forks of the hi-lo when the band
18 snapped? Were they still on the piece or had they been
19 lowered?

20 "A Coming out of the piece."

21 Do you recall having answered that question that
22 way?

23 A No.

24 Q What do you mean when you say "Coming out of the
25 piece"?

1 gp

Capparo-cross

26

2 A He backed out. He backed away.

3 Q Do you recall this question and answer?

4 "Q In other words, the hi-lo was withdrawing the
5 forks from underneath this carton when the band snapped;
6 is that right?

7 A Right."

8 Do you recall that answer to that question?

9 A Yes.

10 THE COURT: Mr. Capparo, take a look at page 40.
11 That's what he was just reading to you, the lower half of
12 page 40.

13 (Pause.)

14 THE WITNESS: Thank you.

15 THE COURT: Hold on to that. Maybe he will ask
16 you something else.

17 Q You see on page 40, line 15, I ask you this:

18 "Q Do you know why the band snapped?

19 A No."

20 Do you recall having given that testimony?

21 A I don't remember it.

22 MR. BAXTER: We stipulate those are the questions
23 and answers given, your Honor, back in 1972.24 Q Mr. Baxter asked you a moment ago whether the
25 case on which you were standing, the long case -- by that

1 gp Capparo-cross

27

2 you mean it was a wooden package?

3 A Yes.

4 Q He asked you whether that case on which you were
5 standing rested directly on a chassis. Do you recall him
6 asking you that question?

7 A Yes.

8 Q Did it?

9 A Yes, sir. It rested on a chassis.

10 Q Directly on it?

11 A Yes.

12 Q Do you recall on page 28 -- if you want to turn
13 to that, the middle of the page, line 15, I put this question
14 to you and you gave this answer?

15 "Q A case which was stowed on top of the chassis?

16 "A A narrow case.

17 "Q Would you say the case was --

18 "A There was dunnage too there, like some dunnage.

19 "Q Well, you call it 'dunnage.' Do you mean there
20 were dunnage boards, there were dunnage boards they used
21 for dunnage? Which is it you are talking about?22 "A They put dunnage on there so they rest the other
23 case on, the narrow case, on top of the chassis."

24 Do you recall those questions and those answers?

25 A Yes. They had dunnage on there.

1 gp

Capparo-cross

28

2 Q Did that refresh your recollection that there
3 were pieces of dunnage between the case which you were
4 standing on and the chassis beneath?

5 A That's right.

6 Q Did any of that dunnage break?

7 A Yes. There were some pieces.

8 Q Did the dunnage break when this falling piece
9 hit the case?

10 A Yes.

11 Q By that time, by the time the dunnage broke, you
12 had already been flipped up into the air; is that right?

13 A When the case -- when the carton hit the case
14 I flipped up in the air. That's how the dunnage broke.

15 Q Do you recall these questions and answers on the
16 last page of the transcript, the second last page, page 47?

17 "Q You tell me a piece of dunnage broke when this
18 falling carton, as we have called it, hit this thin long
19 case, which case was in turn resting on top of some dunnage?

20 "A On top of the chassis.

21 "Q And the dunnage was between the case and the
22 chassis; is that right?

23 "A Yes.

24 "Q And when this falling piece hit the case, that
25 caused some of the dunnage underneath the case to break?

1 gp

Capparo-cross

29

2 "A Yes.

3 "Q By that time you were in the air with your feet
4 up in the air; is that right?

5 "A Yes."

6 Do you recall those answers to those questions?

7 A Yes.

8 Q What did you mean when you testified that by that
9 time your feet were in the air?

10 A I didn't testify that my feet were in the air.

11 I was level, body level, when I got knocked over.

12 Q Your feet were not on the case?

13 A No. It was level this way (indicating).

14 Q They were above the case?

15 A Above the case.

16 Q Mr. Capparo, as best as you can recall, would
17 you say that what happened to you was very much like what
18 happens on a see-saw? You were standing towards one end
19 of a long thin case and an object weighing more than you
20 fell down some number of feet on to the other end of the long
21 thin case, and that caused you to be thrown up in the air;
22 is that right?

23 A That's right.

24 Q Do you recall these answers to these questions on
25 pages 40 and 41? One of them I have already asked you:

1 gp

Capparo-cross

30

2 "Q In other words, the hi-lo was withdrawing the
3 forks from underneath this carton when the band snapped;
4 is that right?

5 "A Right.

6 "Q When this happened the cargo began to fall?

7 "A Probably the other piece underneath gave way.
8 I don't know.

9 "Q But the only thing that fell was the piece which
10 the hi-lo was trying to put up; is that right?

11 "A Yes."

12 A Right.

13 MR. KIMBALL: No further cross-examination.

14 THE COURT: Is there any redirect examination,
15 Mr. Baxter?

16 MR. BAXTER: No, your Honor.

17 THE COURT: Thank you, Mr. Capparo. You may
18 step down.

19 (Witness excused.)

20 MICHAEL PACUILLA, called on behalf of
21 the plaintiff, being first duly sworn, testified
22 as follows:

23

24

25

1 qp Pacuilla-direct

31

2 DIRECT EXAMINATION

3 BY MR. BAXTER:

4 Q Mr. Pacuilla, what is your occupation?

5 A I am a longshoreman.

6 Q How long have you been a longshoreman?

7 A About 23 years.

8 Q On September 17, 1971, were you a longshoreman?

9 A Yes.

10 Q Were you a member of a regular gang?

11 A I am a member of a regular gang, yes.

12 Q Even in September of 1971, were you a member
13 of a regular gang?

14 A Yes.

15 Q What was the name of your hatch boss?

16 A My gang was broke up.

17 Q On that particular day, but what was your
18 ordinary gang, your regular gang?

19 A Angelo DiCristina's gang.

20 Q Is that the same gang that Mr. Capparo was in?

21 A Yes.

22 Q You worked in the same gang ordinarily?

23 A Yes.

24 Q As of September, 1971?

25 A Yes.

1 qp

Pacuilla-direct

32

2 Q Do you still work in the same gang today?

3 A Yes.

4 Q So, naturally, you know Mr. Capparo?

5 A Yes.

6 Q You said you were broken up that day. What
7 gang did you work with on September 17, 1971?

8 A With Salica's gang.

9 Q What pier did you work that day?

10 A 39th Street.

11 Q Is that in Brooklyn?

12 A In Brooklyn.

13 Q Do you remember the name of the vessel you
14 worked on?15 A I believe it was the Hercules, or something like
16 that.17 Q For what stevedoring company were you working
18 that day?

19 A Northeast.

20 Q What hatch were you working in?

21 A I believe it was No. 2 hatch.

22 Q What part of No. 2 hatch?

23 A Down the lower hold.

24 Q Did you get there some time after 8 o'clock in
25 the morning?

1 qp Pacuilla-direct 33

2 A Yes.

3 Q Did you work during the morning without any
4 trouble?

5 A No, no trouble.

6 Q In the afternoon did you witness an accident to
7 Mr. Capparo?

8 A Yes, I did.

9 Q About what time in the afternoon did this occur?

10 A Around 20 to 5. It was close to knocking-off
11 time.

12 Q Knocking-off time is 5 o'clock?

13 A I don't know if we were supposed to finish the
14 ship or something like that, but it was close to 5 o'clock,
15 I know that.

16 Q Was there a loading operation?

17 A Yes.

18 Q What were you loading in the morning and in the
19 afternoon before the accident in No. 2 lower hold?

20 A Just general cargo, cases, and cartons, and
21 different things.

22 Q What method was used to stow the cargo in the
23 No. 2 lower hold in that afternoon?

24 A We did have a hi-lo down the hold, a machine.

25 Q Who was driving the hi-lo?

1 QP

Pacuilla-direct

34

2 A The hatch boss, Salica.

3 Q Would you tell the Judge and jury what you saw
4 at the time of Mr. Capparo's accident?5 A Just prior to the accident we were putting --
6 the hi-lo was putting a case up on the top of other cargo
7 and it would have finished that side of the wing, you know.
8 He backed out and, like, made sort of an L-turn, and 10
9 seconds, 15 seconds, later this case had fell down from
10 the top and snapped a band and fell and hit a case that
11 Pete was standing on.

12 Q Where was that case that he was standing on?

13 A It was like in the square, like off to the
14 square.

15 Q Can you describe the case he was standing on?

16 A There were a couple of automobile chassis there
17 and it was a long narrow case, and he was standing on it,
18 sort of to guide Mr. Salica into this spot for that last
19 case that just went in.

20 Q Was there dunnage under the case on the chassis?

21 A As a rule, they -- yes, there was.

22 Q Was there dunnage?

23 A There was dunnage, yes.

24 Q What did you observe when the case came down?

25 A Well, I heard like a crackling sound, and I was

1 qp

Pacuilla-direct

35

2 a little more away from it. I was on the floor of the
3 hatch. Pete was standing on the chassis, on top of this
4 case, and I guess we all heard it. The band broke and it
5 started to give way under the pressure. It was kind of a
6 heavy case, I guess.

7 Q What started to give way?

8 A The cartons underneath it.

9 Q They gave way?

10 A Yes.

11 Q Then this case came out?

12 A Fell on this piece that Pete was standing on.

13 Q What was this heavy carton -- can you describe
14 it to us? -- that was put on the stow there?

15 A About 10 feet -- It was corrugated wrapped with
16 some bands on it, with steel straps on it.

17 Q This was the one that was put in the stow?

18 A Yes.

19 Q By means of a hi-lo?

20 A It was too heavy to pick up.

21 Q What would be the dimensions of this carton,
22 as best as you can recollect?

23 A I would say about 8 feet, 7 feet, somewhere around
24 there. It could have been 6. 6 by maybe 3 by 3, or some-
25 thing like that. Something like that.

1 qp

Pacuilla-direct

36

2 Q What was this carton resting on when it was
3 first put in stow?

4 A It was resting on some other cartons. There
5 might have been two or three cartons that it was resting
6 on.

7 Q You don't recall whether it was two or three?

8 A I don't recall. It could have been two or
9 three. It was more than one, I know that.

10 Q Which of the cartons did you say were crushed?

11 MR. KIMBALL: Objection, your Honor.

12 THE COURT: Sustained as to form. I think you
13 can rephrase it.

14 Q What did you observe regarding the cartons under-
15 neath the carton that was placed in stow?

16 A After he had pulled out it started to sag.

17 Q What started to sag?

18 A The cartons underneath the one he had stowed,
19 and that sort of gave way and it fell, it broke the band and
20 fell right on top of this piece that Pete was on.

21 MR. BAXTER: I have no further questions.

22 CROSS EXAMINATION

23 BY MR. KIMBALL:

24 Q You say there was dunnage between the case that
25 Pete was standing on and the chassis beneath that; is that

1 qp Pacuilla-cross 37

2 correct?

3 A Yes.

4 Q Did that dunnage break when the carton fell on

5 it?

6 A Yes. It did break when the case hit it.

7 Q Dunnage made of what? Thin pieces of wood?

8 A Yes.

9 Q Did you hear it breaking?

10 A I observed it breaking.

11 Q Did you hear it?

12 A Yes, I heard it, with everything else.

13 Q It made sort of a crackling sound like wood

14 splintering up?

15 A Something like that.

16 Q Did you see anything else fall other than the

17 piece which Salica had put into stow?

18 A No.

19 Q That was a banded carton; is that right?

20 A Yes.

21 Q I think you said that was stowed in a space on

22 top of other cargo?

23 A Right.

24 Q The cargo beneath it, it was other cartons?

25 A Cartons, yes.

1 cp Pacuilla 38

2 MR. KIMBALL: No further cross-examination.

3 THE COURT: Mr. Baxter?

4 MR. BAXTER: Nothing, your Honor.

5 THE COURT: Thank you, Mr. Pacuilla.

6 (Witness excused.)

7 MR. BAXTER: Plaintiff rests at this time, your
8 Honor.

9 MR. KIMBALL: So does the defendant, your Honor.

10 THE COURT: Ladies and gentlemen of the jury,
11 I will ask you to take your morning recess at this point.
12 We will be back with you in about ten minutes.

13 I will ask counsel to remain.

14 (Jury excused.)

15 THE COURT: Do you want to make motions,
16 gentlemen?

17 MR. KIMBALL: I do, your Honor.

18 THE COURT: All right.

19 MR. KIMBALL: If your Honor pleases, I move
20 for a directed verdict on negligence because of failure of
21 proof and notice by the defendant.

22 THE COURT: Also, I don't really see how there
23 would be any proof of negligence on the part of any ship's
24 officers, employees, or agents other than the plaintiff.

25 MR. KIMBALL: I quite agree with your Honor.

2 THE COURT: I don't think there is much doubt
3 about that, is there?

4 MR. BAXTER: Plaintiff? I don't see any
5 contributory negligence on the plaintiff's part.

6 THE COURT: We are not talking about con-
7 tributory negligence. We are talking about what I will
8 summarize as failure of proof of any negligence on the
9 part of the ship through one of its officers or employees
10 other than Mr. Capparo.

11 MR. BAXTER: It is not "other than Mr. Capparo."
12 It is the hatch boss. The --

13 THE COURT: He is not a ship's --

14 MR. BAXTER: He is an agent for the ship doing
15 a non-delegable duty, performing a non-delegable duty.

16 THE COURT: I'm sorry. We seem to have gotten
17 things transposed a bit.

18 Skinny, or Sonny Salica, is not a member of the
19 crew. He is not a ship's officer. He is an employee
20 of Northeast against whom Capparo has a direct claim in
21 compensation, and so on. That does not make him a vessel
22 crew member, so I am going to grant defendant's motion for
23 a directed verdict on the issue of negligence.

24 MR. KIMBALL: If your Honor pleases, in context
25 too, at this time the defendant withdraws any defense of

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2 contributory negligence so that negligence by plaintiff,
3 as such, is no longer claimed or at issue in this litiga-
4 gation.

5 As to the unseaworthiness claim, defendant
6 moves for a directed verdict for failure or insufficiency
7 of proof of any unseaworthiness.

8 It would appear from the testimony that if there
9 was any fault it was the fault of either Mr. Salica or --
10 I don't know anybody else involved. I guess he's the
11 only person involved here. Whatever his fault was -- and
12 I don't know of any really on the basis of the evidence --
13 it was instantaneous or nearly so with any consequences
14 of that assumed fault which may have been a contributing
15 cause of the plaintiff's accident, so that would be Usner,
16 but for the life of me I don't believe we get Usner in
17 this case because I don't see any evidence that anybody
18 was at fault.

19 THE COURT: It may have been that Northeast,
20 through Salica and others, was guilty of a negligent stow.

21 MR. KIMBALL: It was kind of an awkward piece
22 and they were putting it up at a height with the hi-lo,
23 and I would imagine that while doing work of that sort,
24 even experts such as Northeast and Mr. Salica, occasionally
25 a piece of cargo may fall. It may not stay where it is

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2 put for some reason or other, but, in any event --

3 THE COURT: You are saying there is no proof
4 even assuming that the stow was improper. We don't really
5 have any particular proof of that. Is that what you are
6 arguing?

7 MR. KIMBALL: If I were sitting on the jury
8 I could not find there was any impropriety in the manner
9 of the stow or in anything that Salica did or did not do
10 or, indeed, that anybody else did or did not do.

11 Furthermore, I don't find any proximate cause
12 between what is claimed to have happened, even assuming
13 that with unseaworthiness and the accident. Some
14 dunnage broke when a heavy piece fell some number of feet,
15 but by that time, according to the plaintiff's testimony,
16 he was, or simultaneously therewith he was, flipped up in
17 the area like an acrobat. At some stage in the game a metal
18 band broke, but that is not supposed to have anything at
19 all to do with the accident, at least on the basis of
20 this evidence. The band, according to the plaintiff's
21 deposition testimony, broke while Mr. Salica was removing
22 his blades from beneath it.

23 THE COURT: Let me hear you on this.

24 MR. BAXTER: The claim here is an unseaworthy
25 condition in that the shipowner warrants that the cargo

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2 and the stow will be safe, and here it was obviously unsafe,
3 and the proximate cause --

4 THE COURT: Hold on. You are going too fast.

5 Was unsafe? I don't follow you.

6 MR. BAXTER: There is the expert stevedore
7 placing this case on top of cartons which collapsed.

8 It was the collapse of the stow that proximately caused
9 the plaintiff's accident. It is one continuous chain of
10 events. As the carton collapses the case that they are
11 putting in the stow, the large case, it is heavy, falls
12 down and hits the long narrow case on which the plaintiff
13 is standing and catapults him. The strawman of the
14 dunnage has no consequence here whatsoever.

15 THE COURT: Assuming that for the moment, if that's
16 your theory --

17 MR. BAXTER: That's the theory.

18 THE COURT: I don't understand. Who says that
19 the stow was improper?

20 MR. BAXTER: The very fact that it gives way
21 shows that it is improper, putting a heavy case on top of
22 a carton that crushes because of the weight, and then that
23 very carton falls down hitting the case and catapults the
24 plaintiff. That, in itself, is an unseaworthy stow.
25 That is not what an expert is supposed to do. An expert

2 is supposed to stow that case in such fashion as it will
3 stay put.

4 THE COURT: Pacuilla said he recalled that
5 Salica, with the guidance of the plaintiff who was helping,
6 guiding him, raised this carton, which was supposedly quite
7 heavy, the corrugated cardboard with metal straps. The
8 piece was positioned quite high and on top -- as Pacuilla
9 put it -- of at least two or three other cartons. So
10 you say that's an unseaworthy condition?

11 MR. BAXTER: In that direct result was the
12 weight of this crushed the cartons underneath it, and
13 then it precipitated -- as a result, the carton that was
14 stowed falls. I say that that constitutes an unseaworthy
15 condition.

16 THE COURT: Aren't you flying right into the
17 Usner doctrine?

18 MR. BAXTER: Usner states that instantaneous
19 negligence cannot constitute an unseaworthy condition.
20 The condition has to arise first. The condition that
21 arose here was in the beginning when the hatch boss started
22 to place this heavy carton on top of the collapsible
23 cartons.

24 THE COURT: That's fairly instantaneous, according
25 to your witnesses. Pacuilla put it neatly: It was within

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2 10 to 15 seconds after Sallica was in the process of
3 withdrawing the forklift from the stow that this all
4 started in motion. That sounds pretty close to
5 instantaneous to me.

6 MR. BAXTER: It is a big difference between
7 instantaneous. The Supreme Court said they meant exactly
8 that. When they said instantaneous negligence is the
9 proximate cause of the event, it is not a condition.
10 Here the condition of the unseaworthiness, by Pacuilla's
11 own testimony, existed for 10 to 15 seconds. The condition
12 existed and that's all we have to have as unseaworthy, an
13 unseaworthy condition, not the proximate cause.

14 THE COURT: Wait a minute.

15 MR. BAXTER: The proximate cause of the falling
16 of this case was the collapse of the cartons underneath it,
17 the weak cartons with the heavy case on top of it.

18 THE COURT: Now I know your theory.

19 What do you say about that, Mr. Kimball?

20 MR. KIMBALL: Usner.

21 THE COURT: Short of Usner --

22 MR. KIMBALL: Short of Usner --

23 THE COURT: As I understand it, you say -- put
24 Usner to one side. I suppose you would agree there can
25 be cases where there is a negligent stow that creates an

2 unseaworthy condition?

3 MR. KIMBALL: I do agree. I would agree if there
4 is a topheavy stow, which is basically, I think, what
5 Mr. Baxter is suggesting. If that topheavy stow had reached
6 the point where it was a semi-permanent condition, then
7 we would have, or could have, unseaworthiness. But here
8 the stowage of the cargo had either not been, or barely
9 been, completed when 10 or 15 seconds later this piece of
10 cargo fell, according to the witness Pacuilla, and
11 according to Mr. Baxter the inference of the testimony is
12 that it fell after cases beneath it collapsed and the band
13 on the piece which fell broke, so we have some events
14 apparently occurring, click-clack, over a period of 10 or
15 15 seconds, or because, for purposes of argument's sake,
16 Mr. Sallica created an assumed unseaworthy condition by
17 putting this too-heavy cargo on top of weaker cargo.

18 You asked me to distinguish the hypothetical
19 from Usner. I can't.

20 THE COURT: According to Mr. Baxter, the Supreme
21 Court, when they said instantaneous meant nothing more or
22 less than it had to happen within the confines of a second,
23 maybe, at best. Isn't that a fair --

24 MR. BAXTER: It is fair to this extent, that
25 the Supreme Court said that it was also the proximate

cause. The negligence instantaneously being committed is the proximate cause, and here I make the distinction that when they withdraw the blades and the hi-lo is away from there it is a completed stow and it is an unseaworthy stow.

MR. KIMBALL: Your Honor will recall that case -- I forget the name of it -- but there are three or four opinions in the same decision, and one has become classic -- this is pre-Ushner. When the Second Circuit was struggling with this business of when does a negligent act become an unseaworthy condition, Judge Hayes made the analogy of the broken windowpane. You may recall somebody negligently breaks a windowpane. Well, at that instant there is not any unseaworthiness, even though we have a broken windowpane; nor, he says, is there any unseaworthiness while those pieces of glass are falling out of the broken windowpane on to the deck. But he says that after the pieces of glass get on to the deck, and, very cagily, are there for some time, then we have an unseaworthy condition.

Here, if your Honor pleases, we are awfully close to that analogy and that, incidentally, is an analogy which your Honor may recall has been cited time and time again by judges, including the United States Supreme Court, in an effort to struggle with this thing

2 pre-Usner.

3 Usner, if it was intended to do anything, was
4 intended to make the lives of district judges a little
5 bit easier by not having to worry about falling glass out
6 of windowpanes and the like, or, in this case, not having
7 to worry about falling cargo which had just been placed
8 there, give or take 10 or 15 seconds at most, prior to the
9 accident.

10 THE COURT: I don't suppose either one of your
11 gentlemen would recall offhand the citation of Usner?

12 MR. BAXTER: No, sir.

13 THE COURT: It is 3-something, 390-something,
14 Usner vs. Luckenbach.

15 MR. KIMBALL: I think it is Luckenbach Overseas.
16 I am embarrassed. I don't have the citation here.
17 It has to be one of those cases that we all talk about
18 but don't remember the citation.

19 THE COURT: I want to take another look at
20 Usner. I think I had better rush upstairs and do that.

21 I am inclined to think that probably Mr. Kimball
22 is right because I just don't believe the doctrine is that
23 finely spun. Taking the theory you advance, it was all
24 instantaneous in that a chain of events was set in motion
25 and they had their effect within 10 to 15 seconds after

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2 this piece was positioned high up in the stow. That's about
3 the only inference, really, or that's the only ultimate
4 inference, one can take from the combined testimony of
5 Messrs. Capparo and Pacuilla.

6 Let me take a short recess so I can look at
7 Usner.

8 MR. BAXTER: When you read the case, will you
9 bear in mind that my recollection is that they only sued
10 on unseaworthiness, and in that case the Court said that
11 instantaneous negligence did not create a condition that
12 was the proximate cause. Here I say the unseaworthy con-
13 dition is the proximate cause. The condition actually
14 existed before the accident.

15 (Recess.)

16 THE COURT: Gentlemen, I report, first of all,
17 that the decision on the merits appears, that is the
18 decision on the merits of Usner vs. Luckenbach, at 400
19 U.S. 494.

20 I considered this a rather close question.
21 However, I am not at all sure, but what may be the more
22 prudent thing is to put this to the jury. However, I am
23 going to reserve decision and control the situation to
24 that extent.

25 In other words, to recapitulate, I am granting

2 the defense motion for a directed verdict on the issue of
3 negligence.

4 We also recognize that the defendant has with-
5 drawn any claim, or possible claim, of contributory
6 negligence on the part of Mr. Peter Capparo.

7 With respect to the claim of unseaworthiness,
8 I reserve decision on that, and I am going to ask you to
9 argue to the jury. I will instruct the jury, more or less,
10 following the rubric of the Supreme Court as espoused by
11 Justice Stewart who wrote the majority opinion, as you
12 know.

13 Would you rather sum up now or would you rather
14 wait and have the jury go out early: Then we will come
15 back, sum up, and then the Judge will charge?

16 MR. BAXTER: It makes no difference to me.
17 If we summed up now it might be better.

18 THE COURT: Why not sum up and then we will have
19 lunch and then the charge?

20 MR. BAXTER: Do you want to work on the sum-
21 mation?

22 MR. KIMBALL: My instinct is to have the charge
23 immediately following the summations. I don't think you
24 can charge, or want to charge, before lunch.

25 THE COURT: I would prefer not to.

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2 MR. KIMBALL: I don't think you can, and for
3 that reason only I would prefer to sum up after lunch.

4 THE COURT: It is now 12.15. What we will do
5 is this: we will subside now. I am going to have Mr.
6 Bowes ask the jury to be back at 1.30, or a few minutes
7 before.

8 I don't see any written requests.

9 I will charge the conventional stuff. If you
10 don't consider it conventional, I will go into some Usner-
11 type instructions and questions, but if there is anybody
12 that wants to submit anything specific, all right.

13 See you at 1.30.

14 (Luncheon recess.)

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A F T E R N O O N S E S S I O N

1.30 P.M.

(Jury in box.)

THE COURT: Ladies and gentlemen of the jury, it is my understanding that both sides have rested on the question of liability in the case.

Is that true, gentlemen?

MR. BAXTER: Yes, your Honor.

MR. KIMBALL: Yes, your Honor.

THE COURT: Therefore, we come now to that stage in the trial where we will hear closing arguments from, first, Mr. Kimball, for the ship company and then, second, and last, Mr. Baxter, for the plaintiff.

MR. KIMBALL: May it please your Honor, ladies and gentlemen of the jury: The only claim is that my ship was unseaworthy because the hatch boss, Mr. Salica, put a too-heavy carton on top of some other cartons which caused those beneath to sag, the top carton to fall, and injure the plaintiff in the way he described, namely, it fell on one end of the see-saw and he flipped up on the other end.

I emphasize that's the only claim here because on occasion jurors, we learn later, spend a lot of time considering things which are not claimed and, occasionally,

2 we learn they decide cases on the basis of things that are
3 not claimed, and, of course, we cannot live with that
4 system because Mr. Baxter's client makes a claim and he
5 hopes to prevail on that claim, and my client, who is
6 defending against that claim, we either win or lose on
7 the basis of that claim and not something else that may
8 be dreamed up in the juryroom or elsewhere.

9 The only claim, I repeat, is that the ship
10 was unseaworthy because the hatch boss put a too-heavy
11 carton top.

12 It certainly won't surprise you to be reminded
13 that since the plaintiff makes this claim the plaintiff
14 has the burden of proving it. He has the burden of per-
15 suading you, each, all and each of you, by a so-called
16 preponderance of the credible evidence that what he claims
17 is more likely true than not true. His claim, as I have
18 mentioned, is based upon a contention that the carton which
19 the hatch boss put on top was too heavy. Was it too heavy?
20 We know it was heavy. It was heavy at least by
21 standards of a person wanting to pick something up.
22 It weighed over 250 pounds, but, in the context of what
23 else was down there, was it relatively too heavy?

24 The claim is also based upon what I think is
25 close to sheer speculation that the weight of this too-

2 heavy carton caused some cartons to sag. Well, was it the
3 weight which caused those other cartons to sag or was it
4 the method by which the work was being performed, or,
5 indeed, was it because the cartons underneath were too
6 weak or had something wrong with them? I don't know.
7 I suggest that none of you can really know either.

8 Of course, I think it was evident to you that
9 my client and I prepared to defend this case on the
10 basis of the plaintiff's deposition testimony, the portions
11 which were read to you this afternoon. His deposition
12 testimony was fairly straightforward. He testified that
13 while the hatch boss was pulling the blades out from
14 beneath the carton on top, one of the metal bands broke
15 that caused the carton ~~on top to bulge and, in the process,~~
16 ~~it tumbled off.~~ The implication, I suppose, is that
17 in the process of withdrawing blades, which, of course,
18 are metal, steel, some way it snagged or broke one of these
19 bands. That's the claim that was made in the deposition,
20 as I understood it, and that's the claim which we prepared
21 to defend.

22 But that's not the claim being made now. On
23 the basis of the testimony of the witness who testified
24 here this morning, he said that he was some distance away
25 from this, and he noted that after this carton was put up

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2 on top those beneath it began to sag, and a few seconds
3 later -- I think he testified 10 or 15, something like
4 that -- this carton top came tumbling off.

5 The Judge, I believe, will charge you the
6 following things, among others, which I ask you to keep
7 particularly in mind when deciding this case:

8 First, I think he will tell you that the mere
9 fact that an accident may have happened aboard my client's
10 ship, or that the plaintiff may have been injured while
11 working aboard my client's ship, does not entitle the
12 plaintiff to any recovery against my client. More
13 specifically, the mere fact that some cargo may have
14 fallen while the longshoremen were loading my client's
15 ship does not necessarily mean that my client is liable
16 or that my client's ship was unseaworthy or anything aboard
17 the ship was less than reasonably fit for its intended
18 purpose.

19 If we can all visualize putting boxes in a room
20 as big as this courtroom, in the course of putting them
21 in or, indeed, taking them out, it is entirely possible
22 that something may fall. That does not mean that there is
23 any fault. It does not mean that there is anything wrong
24 with the work or the way the work is being done.

25 In that connection I think the Judge will charge

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2 you: My client is not in the stevedoring business; my
3 client is in the shipping business. They hired Northeast
4 Stevedoring Company to load the ship.

5 I believe the Judge will tell you that my
6 client is not responsible for the method by which the
7 longshoremen did the work or for the manner in which they
8 did the work. That is their work. They are hired to
9 do that. They are the experts in this business.

10 Particularly, I believe the Judge will charge
11 you --

12 MR. BAXTER: Objection at this point. I believe
13 we are going into the law, and I do not believe it is a
14 correct statement of the law.

15 THE COURT: That may well be. In other words,
16 Mr. Kimball is saying these things at some peril that the
17 Judge may say differently.

18 MR. BAXTER: I don't think it is fair comment
19 in the summation to go into the law. It is supposed to be
20 a marshalling of the facts.

21 THE COURT: I am inclined to believe that, but
22 I assume this is a preamble to just that. Hopefully you
23 will get to whatever your factual argument is in this
24 regard.

25 MR. KIMEALL: I was about to say, as you say,

2 at the possible risk of peril to someone, that I anticipate
3 in connection or in conjunction with that, that the Court
4 will tell you that my client is not responsible for any-
5 thing which Mr. Salica, the hatch boss, who is an
6 employee of Northeast, did or did not do.

7 I pause there to say that again on the basis
8 of the evidence introduced by the plaintiff, who has the
9 burden of proof, I would not have any basis for believing
10 that Mr. Salica did anything wrong. But even were you to
11 believe that Mr. Salica had done something wrong, my
12 client would not be responsible for that because Mr.
13 Salica didn't work for us.

14 The last thing which the Court has advised us
15 that it would charge has to do with kind of a funny con-
16 cept which I think is sometimes referred to as instantaneous
17 unseaworthiness, and I know the Judge will give you a
18 complete charge as to that, and within the context of the
19 evidence in this case you will be asked to determine whether
20 my vessel could be held unseaworthy because of something
21 which the longshoremen did or did not do or may or may not
22 have done which moments, seconds, later resulted in the
23 claimed accident.

24 All of this, I think, is in context with some-
25 thing else, which, I believe, you will hear the Judge

2 mention making use of the word "reasonable" because, as
3 I have had occasion to try to impress upon jurors for
4 quite a while, the purpose of the law, the desire and
5 goal of the law, is to be reasonable. It does not always
6 succeed. Nothing in the world is perfect, but -- and the
7 law is far from perfect -- the goal of the law is to be
8 reasonable, and consistent with that I think you will hear
9 the use of the word "reasonable" during the Judge's charge,
10 and you will be told that that is the test by which my
11 client and, more particularly, my client's ship, is to be
12 judged: reasonableness.

13 Last of all, I remind you of your oath which you
14 took, to well and truly try this case according to the
15 evidence and the law and to render, as your oath said,
16 a true verdict to the best of your collective ability.

17 Thank you very much.

18 MR. BAXTER: May it please the Court, and Ladies
19 and Gentlemen of the Jury: To begin, you should remember
20 that the plaintiff is a longshoreman. He is not the steve-
21 dore. He works for the stevedoring company. It is the
22 stevedoring company or corporation which is not a party
23 to this action. They, in turn, employ people. He is
24 the hold man. He is the donkey they use in a lower
25 hold. He works in the hold and uses his physical brute

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strength to lift up packages and stow them. That's his job. He takes orders from his hatch boss who this day was Salica. It was not his usual hatch boss. His usual hatch boss belonged to a different gang. They were extra men to flesh out this gang that was short men.

Mr. Pacuilla, who is from his regular gang, was also an extra man in this gang. They worked in the lower hold.

There is no point in my going over the testimony. You heard it just within an hour or an hour and a half ago. It is fresh in your mind. If anything, I might end up confusing you.

What I would like to do is merely point out the significance of the testimony you have heard.

At this stage of the case there is no negligence claim before you. The Court has taken that out of the case. The only claim that is before you will be whether or not the vessel was seaworthy.

Seaworthiness, you must remember -- and it will be charged -- is a condition. It is not a cause in the sense that instantaneous negligence can be a proximate cause. The Judge is going to charge on this under a special theory in the law called the Usner case. He has already advised you of his intention.

2 Since he is going to charge, the comment I
3 would like to make is that we are not making any claim
4 here whatsoever that something that happened negligently
5 and instantaneously caused this accident. For instance,
6 we are not claiming that a winch lowering a draft all of
7 a sudden drops and we will say injures the man. We are
8 not claiming that. The dropping of that draft would be
9 negligence, and it would be instantaneous, and, therefore,
10 it is the cause of the accident, but it is not the con-
11 dition. This is the point I wanted to get across to you.
12 Unseaworthiness is a condition. It is like a wet floor.
13 That is a condition. It is like snow on the sidewalk.
14 That is a condition.

15 If, for instance, after a freeze it is like icy,
16 as it is in front of the building, horribly icy, if one
17 were to fall the proximate cause of it is the icy con-
18 dition on the sidewalk. It is not instantaneous cause.
19 It is instantaneous to you and it is instantaneous to
20 you if you go down, but the icy condition existed prior
21 to your walking on it, and that's the point I want you to
22 get in your mind, if you will. This is the plaintiff's
23 claim.

24 What is the condition? The condition is that
25 there are two or three, whichever it is, cartons high up

in the stow upon which Salica, using the hi-lo, and with the guidance of the plaintiff, puts this heavy case.

After he stows that heavy case, he backs away and makes what Pacuilla said was an L-turn, gets out of the way, 10 or 15 seconds later, a period of time, the carton or cartons underneath it collapse, are crushed, and this big carton that they have stowed comes down and hits the case on which the plaintiff is backing up and is hurt.

I say to you that upon the evidence that has been put before you from the plaintiff and from Pacuilla, you are justified in finding that this condition existed prior to the accident. The accident did not happen instantaneously. It didn't happen an hour later. It happened 10 or 15 seconds later. That condition of unseaworthiness in the stow, in the cargo, was such as to create this condition, and you are justified in so finding unseaworthiness.

I trust you will bring in a verdict for the plaintiff.

I have nothing further to say.

I thank you.

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2 CHARGE OF THE COURT

3 Tyler, J.:

4 Mr. Jones and Ladies and Gentlemen of the Jury:

5 As you take up your deliberations, please
6 remember that it is your duty under your oaths to return
7 a verdict without sympathy or prejudice for or against
8 either the plaintiff or the defendant.9 Before I get to a discussion of the rules of
10 substantive law, which either will or may apply to the case,
11 depending upon how you assess and determine the facts
12 here, let me take up preliminarily another important
13 matter and that is your role as the sole judges of the
14 credibility of the witnesses and the weight which their
15 evidence deserves.16 Very simply, you are entitled to scrutinize, and
17 you should carefully scrutinize, all of the testimony
18 given, the circumstances under which each witness has
19 testified, and every matter in evidence which tends to
20 indicate whether a witness is worthy of belief. Therefore
21 you can consider such criteria as the witness'
22 intelligence, his motive, his state of mind, his demeanor
23 and manner while he sat here on the witness stand in this
24 brief trial and gave us his evidence this morning. You
25 might consider also any relation that a witness may bear

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to either side of the case, the manner in which the witness may be affected by your verdict, and the extent to which, if at all, a witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of two witnesses may or may not cause you to discredit such testimony. As you know from your own experiences in life, two or more persons witnessing an incident or a transaction, or overhearing a conversation, may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon human experience. In weighing the effect of a discrepancy, if such, you should always consider whether it pertains to a matter of importance or to some unimportant detail. Consider also whether a discrepancy, if such you find, results from innocent mistake or error or from intention or falsehood.

In sum, under the system, ladies and gentlemen, you are entitled to give the testimony of each witness such credibility, if any, as you think it deserves. Put slightly differently, you are entitled to accept or reject, wholly or in part, the testimony of any witness depending upon how you assess his credibility.

As has been pointed out to you, during the

2 recess I made a ruling taking out of the case plaintiff's
3 theory of negligence on the part of the shipowner or one
4 of its agents or employees. That theory of negligence,
5 therefore, is no longer before you, as plaintiff's counsel
6 has just frankly stated in his closing.

7 The theory on which plaintiff is proceeding
8 in his submission to you is the theory that there was
9 an unseaworthy condition on the vessel down in the lower
10 No. 2 hold just before quitting time, that is just before
11 5.00 p.m., on September 17, 1971, and that this unsea-
12 worthy condition proximately caused him to fall, as he
13 has testified.

14 The burden of proof is on the plaintiff in this
15 action, as his lawyer well knows, to prove every essential
16 element of his claim by a preponderance of the evidence.
17 If the proof should fail to establish any essential
18 element of the plaintiff's claim by a preponderance of
19 the evidence, then you would be obliged to find for the
20 defendant shipowner.

21 What does the law mean by this phrase or concept
22 "preponderance of the evidence"? It is really quite
23 simple. It means to prove that something is more likely
24 so than not so. Put differently, a preponderance of the
25 evidence in a case means such evidence as when considered

2 and compared with that opposed to it has more convincing
3 force and produces in your mind's belief that what is
4 sought to be proven is more likely true than not true.

5 Under the maritime law, which is generally
6 applicable to this kind of case, every shipowner, such
7 as the Royal Netherlands Steamship Company, owes to every
8 member of the crew and longshoremen who happen to be
9 working aboard the vessel the duty to keep and maintain
10 the ship and all of its decks and passageways, appliances,
11 gear, tools, equipment and so on, in a seaworthy condition
12 at all times. To be in a seaworthy condition under the
13 maritime law means to be in a condition reasonably suitable
14 and fit to be used for the purpose and use for which it is
15 provided or intended.

16 I point out to you in this context that liability
17 for an unseaworthy condition, as it is called, does not
18 necessarily depend upon negligence or fault or blame,
19 as you and I constantly use those words or terms. That
20 is to say, ladies and gentlemen of the jury, a shipowner
21 is liable for all injuries and damage proximately caused
22 by an unseaworthy condition existing aboard its vessel
23 at any time even though that shipowner may have exercised
24 due care under all of the circumstances or may have had no
25 notice or knowledge of the unseaworthy condition which

2 proximately caused the accident.

3 On the other hand, this does not mean that a
4 shipowner is an absolute guarantor; that is to say,
5 plaintiff must show to your satisfaction something more
6 than the mere fact that he was in an accident or that he
7 was injured. In other words, he must satisfy you by a
8 preponderance of the evidence that the ship, or
9 one of the parts, or appurtenances, or appliances, was,
10 in fact, in an unseaworthy condition.

11 You have heard me use, and I believe you will
12 recall that the lawyers from time to time used, the phrase
13 "proximately caused," or "proximate cause." Proximate
14 cause may be defined in the law to mean an act or a
15 failure to act which plays a part, no matter how small,
16 in bringing about an accident or an injury.

17 With those general rules in mind, you are well
18 aware of the essential outlines of plaintiff's case.

19 Very briefly, as I understand the evidence,
20 about a quarter to five on the day in question, Mr. Capparo
21 was acting as a hold man in the gang of a man known as
22 either Sonny or Skinny Salica, who was driving the hi-lo
23 which was being used from time to time down there to posi-
24 tion in the stow heavier pieces of general cargo. There
25 were, of course -- the witnesses told us -- lighter pieces

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2 which the longshoremen were able to handle themselves, but
3 there were some pieces apparently that had to be positioned
4 in the stow by use of this hi-lo.

5 Very briefly, as I understand it, this accident
6 was somewhat akin to that old circus act many of you will
7 recall in your day. In other words, I refer to where a
8 clown or other performer would be on one end of the see-
9 saw and somebody would either drop a heavy weight on the
10 other end or a person of heavier weight would jump on
11 that other end causing the person positioned on the other
12 side to flip up in the air. Obviously, in the **circus**, they
13 control themselves by training and other ways so that they
14 came down, usually, without any harm to them, but here,
15 according to Capparo, as I understand him, he was on this
16 long, thin wooden packing case, which, in turn, was posi-
17 tioned on top of two or three automobile chassis, between
18 the chassis and this long thin piece, so-called, there
19 being a number of pieces of rough boards or dunnage boards;
20 that he was more or less at one end when a very heavy
21 case which came down late in the afternoon was put on
22 the Salica-driven hi-lo, and then Salica decided to drive
23 his hi-lo and position this heavy piece, so-called, up on
24 top of cargo already stowed in place; then this heavy piece,
25 which, as I understand the evidence, was packed in cardboard

2 or corrugated material with steel straps around it, either
3 slipped or broke loose, came down, and hit one end of the
4 long wooden case on which plaintiff was standing, causing
5 him to "flip up," as he put it, and fall to the deck
6 sustaining some kind of injury.

7 There are some other rules which either will or
8 may come into play here, depending upon the way you assess
9 and determine the facts.

10 It is true that under the law, under certain
11 circumstances, improperly stowed cargo can constitute an
12 unseaworthy condition. Generally speaking, under the law
13 a longshoreman such as Mr. Capparo is owed a safe place to
14 work, and when I say a "safe place," I emphasize a reasonably
15 safe place to work. No one denies that stevedoring work,
16 or longshore work, is and can be dangerous. But the law does
17 not require absolute safety or absolute perfection of all
18 conditions in these holds of a vessel like the Hercules on
19 the day in question.

20 A good example, and an easy example, of an
21 improper stow which might amount to an unseaworthy con-
22 dition would have to do with cargo which is put in place
23 at some foreign port before it came in here to New York
24 Harbor by other stevedores in the foreign port and under
25 appropriate evidence that stow could be deemed as unsafe

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2 and therefore unfit and in unseaworthy condition. My
3 understanding here is the plaintiff argues, to begin with,
4 that the condition of the stow before this accident, which
5 Capparo said took place, was unsafe and thus unseaworthy,
6 and it was a proximate cause of his fall.

7 If you were to determine that there was some-
8 thing about this stow which was unsafe and unfit prior to the
9 time when Salica did this single act of positioning this
10 so-called heavier case, the exact weight of which, as I
11 recall it, we do not know, up on top and that partially or
12 entirely as a result of this condition being unsafe prior to
13 that act by Salica Mr. Capparo sustained his flip or fall, then
14 you would be entitled to conclude that there was an unseaworthy
15 condition proximately causing the accident here complained of.

16 There is still another alternative.

17 if you were to determine that the only cause,
18 that is the sole proximate cause, of the accident was a
19 single isolated act of negligence or carelessness on the
20 part of Mr. Salica, who, after all, by all admissions here
21 of the two witnesses, was the hatch boss, in positioning
22 this cargo where he did or that in some manner in using
23 the hi-lo he was negligent thereby causing this package
24 or heavy piece, as it was sometimes called, to fall down,

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2 strike the long, thin wooden case on which Mr. Capparo was
3 standing, thus causing him to catapult into the air or
4 flip over and fall, and that this was a single relatively
5 instantaneous act of carelessness and negligence on the
6 part of Salica, then you would have to find for the ship-
7 owner because then this would not be regarded under the
8 law I am now discussing as an existing unseaworthy con-
9 dition.

10 Incidentally, let me pause here and caution
11 you parenthetically that what I am instructing you about
12 the law is not necessarily quite the same thing as one
13 or both of the lawyers said. I don't wish to be rude
14 or critical of either one of them. Don't misunderstand me.
15 The point that I am trying to make, please accept my
16 instructions as being controlling and don't accept their
17 statements or arguments of the law or based on the law as
18 controlling.

19 There is still another possibility here, as I
20 see it. It may well be that you could determine that there
21 was no "unsafe" condition; that is, there was no
22 condition which was unseaworthy existing at any time,
23 and if you are to determine that there was nothing improper
24 or unsafe within tolerable limits about the stow at any
25 time, then, of course, you would be obliged to

2 find for the defendant shipowner. This stems from what I
3 said in the affirmative a few moments earlier. It is not
4 enough for the plaintiff, as counsel well knows, simply
5 to come in and show that an accident occurred. He has the
6 burden of showing a little bit more than that; namely,
7 that there was an unseaworthy condition and that it played
8 a part, no matter how small, bringing about the accident.

9 There is one other thing I want to mention to
10 you. You understand this because the lawyers, I think,
11 have made it fairly clear. No one, most importantly the
12 defendant shipowner, is contending that Capparo himself
13 was negligent to any degree; therefore, do not consider
14 or concern yourself with any possible question that Mr.
15 Capparo, the plaintiff, was negligent in any way. Nobody
16 argues that he was.

17
18 The ultimate question therefore for you to
19 determine here is was there an unseaworthy condition existing
20 in this stow which proximately caused the injuries complained
21 of? That's really a two-part question.

22 (1) Was there anything unseaworthy in this stow
23 before that point when Mr. Calica positioned this material
24 and (2) if so, did it play a part, no matter how small, in

2 bringing about the accident which Mr. Capparo claims?

3 I have come to the end of my remarks. I point
4 out to you that we will require a unanimous verdict from
5 you and you should report your verdict as a general verdict,
6 meaning by that that you simply tell us through your foreman
7 Mr. Jones, whether you find for the plaintiff or you find
8 for the defendant on this question of liability.

9 I am going to ask you to sit very quietly where
10 you are. The lawyers and I will file out into what is
11 called the robing room. I want to have them comment upon
12 my instructions. Maybe I left something out unwittingly.
13 Maybe I misstated something.

14 Then we will be right back with you and commit
15 the case to you.

16 (In the robing room.)

17 MR. BAXTER: I have no exceptions or requests,
18 your Honor.

19 MR. KINBALL: I most respectfully except, your
20 Honor, that there is no claim in this case nor is there
21 any evidence -- we don't have to worry about the evidence
22 because there is no claim in this case -- that the stow
23 was unseaworthy before Salica put the claimed too-heavy
24 carton on top.

25 THE COURT: Or put differently, there is no

2 prima evidence of an unseaworthy condition; that is to say
3 no prima facie evidence of an unseaworthy stow.

4 MR. KIMBALL: Your Honor may be entirely right,
5 but I am happy with my own exception. I don't change
6 the exception I made and I don't agree or disagree with
7 the Court. I hope my exception speaks for itself.

8 THE COURT: I will let it.

9 MR. KIMBALL: Your Honor charged this jury there
10 was such a claim and they could find my client liable if
11 they agreed with that claim, and I respectfully ask your
12 Honor to correct that.

13 I also respectfully except for your failure to
14 charge the following Hornbook law, some of which I suggested
15 to the jury you would charge: that the shipowner is not
16 liable for the negligence of the hatch boss or any other
17 longshoreman; that the mere fact that the cargo fell during
18 loading does not, per se, constitute unseaworthiness;
19 that the shipowner is not liable to oversee the methods
20 by which, or the manner in which, the longshoremen
21 perform their duties; and to be seaworthy a stowage of
22 cargo need only be reasonably fit for carriage and dis-
charge.

23 All of that is Hornbook law and all Second
24 Circuit law, and I respectfully submit all should be

2 charged.

3 THE COURT: Part of it I think I have already
4 charged sufficiently, and I, therefore, say that I will
5 charge no more than I have already. Exception to you --
6 or should I say "Exception to your client."

7 Let us go out and see what happens.

8 (In open court.)

9 (Marshals sworn.)

10 THE COURT: Mr. Jones, and ladies and gentlemen,
11 you may retire and commence your deliberations.12 (At 2.15 p.m. the jury retired to
13 deliberate.)

14 (Time noted: 2.35 p.m.)

15 (Roll taken.)

16 THE CLERK: Mr. Foreman, has the jury agreed
17 upon a verdict?

18 THE FOREMAN: They have.

19 THE CLERK: How do you find?

20 THE FOREMAN: Unanimously for the plaintiff.

21 THE CLERK: You find for the plaintiff?

22 THE FOREMAN: Yes.

23 THE COURT: Ladies and gentlemen of the jury:
24 Before we proceed further I am going to ask you to take a
25 short recess so that I can hear counsel briefly on a couple

2 of legal points. Then we will call you back and tell you
3 which way we are going to go for the remainder of this
4 case, if need be.

5 Would you please take a short recess. It should
6 not be more than five minutes.

7 (Jury excused.)

8 THE COURT: Mr. Kimball, I assume that you will
9 renew your motion for a directed verdict and, perhaps, at
10 this stage of the case, in an abundance of caution, you
11 would move for a judgment N.O.V.?

12 MR. KIMBALL: I also move for a new trial on
13 the ground that the verdict in this case may -- indeed,
14 I would give my eyeteeth to bet does -- rest upon a claim
15 which was put into the case in the charge and which is
16 otherwise not in the case, never was asserted.

17 THE COURT: That may be. I won't argue with
18 you. However, I am going to rule now on your motion for
19 a directed verdict in respect to the unseaworthiness claim.
20 Notwithstanding the decision of the Supreme Court of the
21 United States in *Usner vs. Luckenbach Overseas Corporation*,
22 there has ensued in the year since some difficulties in
23 applying that rule. There have been a number of cases
24 in this court, of course, and a number of cases in the
25 various circuits of our appellate court system in the

2 Federal hierarchy.

3 Back in 1971, for example, shortly after Usner
4 came down, there was tried in the District Court of Connecticut
5 with Judge Lumbard sitting there by designation with a jury, a
6 case called Robert Siderewicz vs. Finn Lines, Ltd. vs.

7 Connecticut Terminal Co. Inc. In that case Judge Lumbard
8 granted a directed verdict for the steamship company defendant
9 as against the plaintiff, and then, on appeal, and in a deci-
10 sion by Judge Oscar Davis of the United States Court of Claims
11 sitting by designation in our circuit court, the ruling was re-
12 versed and the case was remanded to put the issue to the jury.

13 As I see it, unlike that case, there is no
14 evidence here from which anyone can infer an improper stow
15 except for the single relatively instantaneous isolated act of
16 the way Mr. Sonny or Skinny Salica handled his hi-lo and placed
17 this so-called heavy carton at the top of the stow just under
18 the wing of the hatch.

19 The only other evidence that we have is rather
20 sketchy, and that is that general cargo was being loaded in
21 this area. Some of the cargo was in one size or another of
22 cardboard cartons; that is to say, cardboard cartons of various
23 sizes as well as wooden cases.

24 As is frequently found in the Port of New York

2 and other ports, this kind of general cargo of a mixed
3 nature was being stowed in the wing of the hatch. There
4 is no evidence whatsoever that there was anything wrong
5 with this technique of loading. There is no evidence
6 that there was anything wrong with the stow. The
7 only thing we know about the stow is that, really,
8 first Pacuilla told us that he recalls that before this
9 last piece of heavy corrugated strap-bound cargo was put
10 in position by Salica there were very smaller cartons
11 immediately under the spot where this particular carton
12 was placed. Then, the other thing we know, is that either
13 this was an improper position to place it, and as far as
14 we know from the evidence the only inference is that
15 Salica himself decided where to put it, or that he did
16 something with his fork or hi-lo which caused the stow to
17 become unstable. That, to me, is very simple and plainly
18 within the Usner rule in that state of facts.

19 We had no expert to say that this stow was
20 wrong. We had nobody, whether he was deemed an expert
21 or not an expert, to say that this method of loading was
22 wrong or that the stow itself was improper.

23 -- - Another shorthand way of saying this is there
24 was no *prima facie* case made out by plaintiff that the
25 technique of loading was improper or that the stow, in
general, was improper or unsafe.

2 The only evidence we have at all was that rela-
3 tively brief act of Salica in positioning this cargo, this piece
4 of cargo, known as a corrugated or cardboard box, and Mr.
5 Capparo and Mr. Pacuilla describe that it was positioned in the
6 wrong place.

7 Therefore, on those two grounds, if you can
8 segregate them out as such, the applicability of the Usner
9 doctrine seems plain, and also there is no *prima facie* proof
10 of anything unsafe or improper about the technique of loading
11 or stowing or nothing unsafe or improper about the stow which
12 existed for any period of time until this isolated single act
13 or action of Salica happened. It is clear beyond a peradventure
14 that nobody representing the ship itself, either an officer or
15 crew member, had anything to do with this episode or, indeed, were
16 even present, as there was no reason for them to be present, at
17 this particular time.

18 Therefore I will grant the defendant's motion
19 for a directed verdict on the issue of liability. It is
20 another way of saying I will grant the motion for judgment for
21 the defendant N.O.V.

22 Mr. Kimball, perhaps I have not articulated
23 quite the way you would articulate it, but I think,
24 as you are always free to say to me, I have stated what

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2 I think I have in my mind with reasonable clarity; if you
3 do not think so please feel free to prod me to expatiate
4 further, if you wish.

5 MR. KIMBALL: There is only one thing I do wish
6 your Honor would do and that is I think the rule itself,
7 and I do believe the upstairs court, or maybe it is down-
8 stairs, depending on where they are these days, encouraged
9 trial judges in this posture to also pass on the new trial
10 motion so that in the event that the circuit court were
11 to disagree with your Honor's granting of the directed
12 verdict or judgment notwithstanding, whichever it is,
13 of course it makes no difference, then the circuit court
14 would be relieved of having to find out what it should do
15 with the case under those circumstances.

16 THE COURT: You certainly don't want me to
17 grant a new trial.

18 MR. KIMBALL: The only thing I think might be
19 done is to say if this is your feeling that in the event
20 the circuit court were to disagree with your direction,
21 then under those circumstances you would grant the new
22 trial and therefore you conditionally grant a new trial
23 if the circuit does disagree, and the reason I think you
24 must condition the granting of a new trial would be a claim
25 of unseaworthiness was submitted to the jury in your Honor's

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2 charge which was not ever claimed by the plaintiff and as
3 to which there never was any proof.

4 THE COURT: Let me put it this way: I would
5 agree that if I am incorrect as a matter of law in
6 directing a verdict in favor of the defendant on the
7 issue of unseaworthiness, then I would think, alternatively,
8 at the very least, that there should be a new trial.
9 Then I think it would be incumbent upon the plaintiff
10 to offer some proof that there was something improper
11 in this method of stowage or that there was something
12 improper about the stow other than simply having the
13 testimony of what Salica did in these relatively few
14 seconds as described in this trial.

15 Does that complete the picture?

16 MR. KIMBALL: I do believe that it does. This is
17 provided, of course, that completion is reflected in the
18 judgment which is to be entered upon what your Honor said.

19 THE COURT: You can settle the judgment on
20 notice.

21 MR. KIMBALL: That might be advisable under
22 the circumstances.

23 THE COURT: I think that's a good idea. I agree
24 with you.

25 Well, Mr. Baxter, I am sorry to reach this view

2 but there it is.

3 I am going to call our jury back in and say for
4 reasons that I will not expatiate upon in any detail there
5 is no longer any need for assistance in this case.6 MR. KIMBALL: Your Honor, it would be my
7 thought to submit the formal judgment on notice to your
8 clerk. Would that be the appropriate way of doing it?9 THE COURT: You can make it returnable before
10 me. Either way.11 MR. KIMBALL: I will make it returnable in your
12 chambers as of a certain date and time.13 THE COURT: There is nothing wrong with that.
14 That may be the better way, actually. We have paper-
15 passing problems inside here. Things do get lost
16 occasionally.

17 (Jury in box.)

18 THE COURT: Members of the jury, for several
19 reasons, which I won't bother to expatiate upon, it has
20 been determined that we no longer need your assistance
21 in this case other than that assistance which you have
22 already rendered, for which we thank you. Therefore
23 I will say, on behalf of all of us, thank you, good-bye,
24 and good luck to you. Perhaps it will be my fortune to
25 serve with one or more of you in the next few days, but

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2 until that happens, if it does, I say good-bye and good
3 luck to you all.

4 (Time noted: 2.55 p.m.)

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JudgmentAppealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This action having duly come on for trial on January 14, 1974 before the Court and jury, Hon. Harold R. Tyler, Jr., District Judge, presiding, and the Court having duly ordered with the consent of the attorneys for both parties that the issue of defendant's claimed liability to plaintiff be initially tried, and the Court having granted defendant's motion, duly made after both sides rested, for a directed verdict in favor of defendant dismissing plaintiff's claim of defendant's liability for negligence, and the Court having reserved decision on defendant's motion, duly made after both sides rested, for a directed verdict in favor of defendant dismissing plaintiff's claim of defendant's liability for unseaworthiness, and the jury having reported a verdict in favor of plaintiff on the claim of defendant's liability for unseaworthiness, and defendant having thereafter duly renewed its motion for a directed verdict in favor of defendant dismissing plaintiff's claim of defendant's liability for unseaworthiness, and defendant having also thereafter duly moved for judgment in favor of defendant notwithstanding the verdict and also, alternatively and conditionally, for a new trial on the issue of defendant's liability for unseaworthiness and, after hearing argument of counsel for both parties and due deliberation, the Court having granted defendant's motion for a directed verdict in favor of defendant dismissing plaintiff's claim of defendant's liability for unseaworthiness, it is

Judgment Appealed From

ORDERED, ADJUDGED and DECREED that defendant have judgment against plaintiff dismissing plaintiff's complaint.

New York, New York
January 21st, 1974.

H. R. TYLER, JR.
U. S. D. J.

Judgment Entered Jan 24 1974

RAYMOND F. BURGHARDT
Clerk

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This action having duly come on for trial on January 14, 1974 before the Court and jury, Hon. Harold R. Tyler, Jr., District Judge, presiding, and the Court having duly ordered with the consent of the attorneys for both parties that the issue of defendant's claimed liability to plaintiff be initially tried, and the Court having granted defendant's motion, duly made after both sides rested, for a directed verdict in favor of defendant dismissing plaintiff's claim of defendant's liability for negligence, and the Court having reserved decision on defendant's motion, duly made after both sides rested, for a directed verdict in favor of defendant dismissing plaintiff's claim of defendant's liability for unseaworthiness, and the jury having reported a verdict in favor of plain-

JudgmentAppealed From

tiff on the claim of defendant's liability for unseaworthiness, and defendant having thereafter duly renewed its motion for a directed verdict in favor of defendant dismissing plaintiff's claim of defendant's liability for unseaworthiness, and defendant having also thereafter duly moved for judgment in favor of defendant notwithstanding the verdict and also, alternatively and conditionally, for a new trial on the issue of defendant's liability for unseaworthiness and, after hearing argument of counsel for both parties and due deliberation, the Court having granted defendant's said motions, it is

ORDERED, ADJUDGED and DECREED that defendant have judgment against plaintiff dismissing plaintiff's complaint, and it is

FURTHER CONDITIONALLY ORDERED, ADJUDGED and DECREED that in the event the United States Court of Appeals for the Second Circuit or the Supreme Court of the United States shall reverse said judgment in favor of defendant, then there shall be a new trial of the issue of defendant's liability to plaintiff for claimed unseaworthiness.

New York, New York
January 21, 1974.

H. R. TYLER, JR.
U. S. D. J.

Judgment Entered Jan 24 1974
RAYMOND F. BURGHARDT
Clerk

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Please Take Notice that the undersigned hereby appeals to the United States Court of Appeals for the Second Circuit from so much and such parts of the Orders of the Honorable Harold R. Tyler, Jr. and the two Judgments thereon, both dated January 21, 1974, both filed January 23, 1974 and both Judgments entered by the Clerk on January 24, 1974, as grant defendant's motion for a directed verdict dismissing plaintiff's claim of liability for negligence and upon the jury reporting a verdict in favor of the plaintiff on the claim of liability for unseaworthiness and the Court granting defendant's motion for judgment notwithstanding the verdict and/or new trial on the issue of unseaworthiness, and the Court granting defendant's motion dismissing plaintiff's claim of liability for unseaworthiness and granting judgment against the plaintiff dismissing plaintiff's complaint.

Please Take Further Notice that the undersigned hereby appeals from each and every part of the afore-

Notice of Appeal

said Orders and Judgments and from the whole thereof,
both upon the facts and upon the law.

Dated: New York, New York
February 12, 1974.

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